PHILLIPS PETROLEUM COMPANY

IBLA 76-684 Decided February 23, 1977

Appeal from a letter-decision of the Wyoming State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease W-062885.

Affirmed.

1. Oil and Gas Leases: Reinstatements

A petition for reinstatement of an oil and gas lease terminated for lack of timely payment of the rental is properly denied where the appellant does not show reasonable diligence in mailing the payment or a justifiable excuse for the delay in payment. A number of factors caused by the inadvertence or negligence of appellant's employees which combined to cause late payment of the rental do not justify the failure to make a timely payment.

APPEARANCES: Thomas L. Barton, Esq., Staff Attorney, Phillips Petroleum Company, Denver, Colorado.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Phillips Petroleum Company (PPC) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated June 22, 1976, denying its petition for reinstatement of oil and gas lease W-062885.

The annual rental was due on or before June 1, 1976. Appellant's check, dated May 28, 1976, was not mailed until June 1, 1976. It was incorrectly addressed to the United States Geological Survey (USGS) in Casper, Wyoming. It

was received by USGS on June 3. USGS forwarded the check and it was received by BLM on June 8. 1/

PPC filed a petition for reinstatement on June 18, 1976. In the petition PPC admitted that its records had been inadvertently marked in a manner which indicated that the lease was in a minimum royalty status, however, during a routine check on May 27, 1976, the error was discovered. On Friday, May 28, 1976, a rental check was drawn on PPC's Treasury Department and placed in the company mail system before 2:30 p.m. Appellant explained that ordinarily this would have provided ample time for certified mail processing and timely delivery; however, inexplicably the letter was retained somewhere in the company mail system and not posted until Tuesday, June 1, after the Memorial Day holiday.

PPC did not mention that the check was incorrectly sent to USGS.

In denying the petition BLM cited the definition of "reasonable diligence" as contained in the headnote in Louis Samuel, 8 IBLA 268 (1972), dismissed with prejudice, Samuel v. Morton, Civil No. CV 74-1112-EC (C.D. Calif., August 26, 1974). Therein, the Board stated:

> * * * "reasonable diligence" in transmitting timely a rental payment for an oil and gas lease is interpreted as meaning posting the payment through the United States mail at no later date than that on which letters mailed thereon would, despite normal delays in the collection, transmittal, and delivery of mail, be delivered to the appropriate land office on or before the due date of the rental.

BLM held that:

> [t]he following facts; (1) your records were marked to show the lease on a minimum royalty basis (even after you were notified in November, 1975 that the account was transferred to this

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1/ The lease in question issued June 1, 1958. During life of the lease the lease account was transferred from BLM to USGS. In November 1975, the account was returned to BLM with the indication that the rental had been properly paid through May 31, 1976. BLM informed appellant by letter dated November 14, 1975, that subsequent rentals were payable to BLM, as provided in 43 CFR 3103.3-2(a).

> office for rental payments); (2) that the account was not written until May 28, 1976 and then sent to the United States Geological Survey, Casper, Wyoming, rather than this office; and (3) the check was not delivered to the post office until June 1st, which was the rental due date, do not constitute "reasonable diligence".

The law dictates that reinstatement of a lease may be granted if the lessee shows "* * * to the satisfaction of the Secretary of the Interior that such failure [to make timely payment of rental] was either justifiable or not due to a lack of reasonable diligence on the part of the lessee * * *." 30 U.S.C. § 188(c) (1970). The two grounds for reinstatement were discussed in Louis Samuel, supra at 273-74:

> * * * the reasonable diligence requirement is primarily an objective test dependent not upon the personal situation of the lessee, but upon what action a reasonably diligent person would take. It is not a protean standard with differing applicability to different lessees; rather it is a fixed criterion which all lessees must meet to avail themselves of the statute's remedial effects.
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> It seems reasonably clear that Congress by the word "justifiable" was adverting to a limited number of cases where, owing to factors ordinarily outside of the individual's control, the reasonable diligence test could not be met. This is thus a subjective test, dependent upon the factual milieu of the individual.
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> To be "justifiable" within the meaning of the statute, sufficiently extenuating circumstances must be present so as to affect the lessee's actions. And it is to be emphasized that the burden of proof is upon the lessee to prove that such was, in fact, the case.

It is clear that the "justifiable" test is limited to those cases, where, owing to factors outside the lessee's control, the reasonable diligence test could not be met.

We will first examine the facts herein to determine if appellant has met the reasonable diligence test. 43 CFR 3108.2-1(c)(2) provides that reasonable diligence normally requires that annual rental payments be sent sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Sarah Turcsan, 23 IBLA 370 (1976); William N. Cannon, 20 IBLA 361 (1975).

On appeal appellant does not dispute the facts of this particular case, rather it stresses that appellant has adopted a normally reliable system for rental payments which broke down in this instance only because of a "regrettable series of factors." Appellant urges that procedures adopted by it and their usual reliability demonstrates that it acted with reasonable diligence.

[1] The fact that appellant has procedures which normally insure prompt rental payments does not establish that appellant has exercised reasonable diligence in this particular case. Regardless of the fact that the check was placed in the company mail system on May 28, the envelope containing the check was not postmarked until June 1, 1976, the due date for the rental. In addition, the check was incorrectly sent to USGS. It is obvious from the facts that appellant failed to exercise reasonable diligence in this case. See Hiko Bell Mining & Oil Company, Inc., 24 IBLA 255 (1976).

Having found that appellant failed to exercise reasonable diligence, we must determine whether appellant's failure to make timely payment was justifiable.

Appellant argues that the Board has adopted a much more stringent interpretation of 30 U.S.C. § 188(c) (1970) in its Louis Samuel, supra, ruling than that intended by Congress. While appellant does not approve of the restrictive Samuel guidelines, it points out that more recent Board cases indicate an "easing away" from the Samuel interpretation. Appellant directs our attention specifically to Great Basins Petroleum Co., 24 IBLA 117 (1976). In Great Basins the rental payment was due on Friday, February 1, 1974. The payment was postmarked February 1 in Santa Fe, New Mexico, and received in the BLM State Office in Santa Fe on February 4, 1974. The lease in question in Great Basins had been committed to a unit and at the time the rental payment was due there was a question whether the unit contained a producing or a producible well. Appellant therein asserted that after much discussion it was decided that even though rental was not due because of the drilling activity, rental would be tendered. A check was

then drawn and flown by helicopter from Albuquerque, New Mexico, to Santa Fe, but the BLM office had closed for the day. The check was then placed in an envelope and postmarked February 1.

In retrospect, the BLM office established that the lease was not capable of actual physical production until March 1, 1974, however, the Board found that the delay in payment was justifiable in that there were sufficiently extenuating circumstances to justify granting the reinstatement.

Appellant contends that Great Basins is similar to the present case in that each case involved a mistake and that both companies intended to retain their respective leases. Appellant believes Great Basins should be controlling herein. We do not.

Because the "justifiable" test is a subjective test, any case which presents justifiable grounds for reinstatement must necessarily be limited to the facts of the particular case. In Great Basins a mistake in judgment was involved; however, this case involved inadvertent or negligent acts by appellant's employees. First, company personnel failed to note the address change on the lease rental sheet and second, somehow the company mail system broke down. These were not events totally beyond the control of the company.

It is well settled that mere inadvertence or negligence of the lessee's agent or employee is not sufficient justification for reinstatement. Serio Exploration Company, 26 IBLA 106 (1976); Samuel J. Testagrossa, 25 IBLA 64 (1976). In addition, the complexities of appellant's business operations do not make its actions justiciable when they would not be so if committed by an individual lessee. See Serio Exploration Company, supra; James Donoghue, 25 IBLA 280 (1976); Monturah Company, 10 IBLA 347 (1973), dismissed without prejudice sub nom. Pashayan v. Morton, Civil No. F-74-5-Civ., E.D. Cal., April 11, 1974.

Given the facts herein, we cannot find that the failure to make a timely payment of the advance rental was justifiable.

Accordingly pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman

Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge.

ADMINISTRATIVE JUDGE GOSS DISSENTING:

I dissent for the general reasons expressed in Lone Star Producing Company, 28 IBLA 132, 140-52 (1976). Appellant's extensive system of cross checks is set forth in detail in the excerpts from the affidavits of Roy D. Wilber and W. F. Moore, Appendices 1 and 2 hereto. The majority holds that despite equitable relief statute 30 U.S.C. § 188(c) (1970), appellant is barred relief because of a one time failure in its regular mailroom procedures and because payment was incorrectly addressed to the Department's Geological Survey rather than to the State Office.

"Justifiable"

As to the incorrect address, the Department had previously required that lease royalty payments be sent to Geological Survey. The error in address is therefore a mistake of fact and hence "justifiable." See Lone Star at 149; cf. Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938). As such, that mistake does not bar equitable relief.

"Reasonable Diligence"

Regarding the mailroom error, I would distinguish appellant's unusually strong good faith effort to make payment prior to termination from the situation in Santor v. Morton, 383 F.Supp. 1265 (D. Wyo. 1974), wherein no effort at payment was made prior to termination.

Appellant's system of processing and mailing payments had been so reliable that there has been only one error in the 4,432 payments made from August 1, 1971, through July 31, 1976. Substantial equities are involved here. The rental payment of $ 727.50 was received on June 8, 1976, well in advance of the end of the 20-day reinstatement period provided by Congress. Phillips alleges it has expended $ 4,864,829 to drill the Cook "C" well approximately 1 mile southeast. The lease is extremely important to appellant.

The equitable relief statute was intended to cover certain mistakes made by a reasonably diligent organization. See Lone Star 143-146, discussing a secretarial error in the matter of Elwyn C. Hale, one of the situations for which Congress specifically attempted to provide a remedy. While appellant herein, like Hale, may not have been absolutely diligent, its system of cross checks and repeated efforts to make timely payment is diligence within the meaning of statute and regulation. The statute contemplates relief despite appellant's error. If no mistake had been made, the payment would have been timely and it would not be necessary to consider whether there had been reasonable diligence.

As discussed in Lone Star at 148-49, the history of section 3108.2-1(c)(2) shows that the proposed regulation was specifically "revised to broaden what constitutes reasonable diligence so as to permit such a finding in special circumstances even when the lessee has not sent or delivered payments in advance of the due date." 36 F.R. 21035 (Nov. 3, 1971). Contra, Louis Samuel, quoted supra.

Joseph W. Goss,
Administrative Judge.

APPENDIX I

ROY D. WILBUR, being duly sworn, deposes and says:

THAT he is employed by Phillips Petroleum Company, Appellant, in the above entitled action, as Manager, Lease Records Natural Resources Group,
Bartlesville, Oklahoma, and makes this affidavit * * *.

I have been Manager, Lease Records, Natural Resources Group, for Phillips Petroleum Company, since 1965. A part of my responsibilities includes overseeing the Lease Rental Section. Mr. William F. Moore, Supervisor, Lease Rental Section, reports directly to me.

Phillips Petroleum Company's corporate policy regarding retention of records is to keep most records for a period of five years. From August 1, 1971 through July 31, 1976, Phillips made 4,432 yearly delay rental payments on Federal oil and gas leases. Lease No. W-062885 is the only Federal lease upon which Phillips has failed to make a timely and proper delay rental payment where retention of the lease was desirable. Thus, during the last five years the Lease Rental Section has had a reliability percentage of 99.98 percent.

The rental payment procedure regarding Federal leases in the Phillips Lease Rental Section in Bartlesville, Oklahoma, is as follows:

Federal oil and gas leases are acquired by our field offices throughout the country, pre-abstracted and then sent to the corporate headquarters for abstract completion and auditing by Lease Records. The abstract sheet of lease information for rental payments and permanent control is then sent to the computer section in Bartlesville to be placed on magnetic tapes by keypunch operation. An IBM rental record is then returned with each abstract sheet for audit by Lease Records and corrections, if any are needed, are made. A separate numerical index control is also created and maintained for cross-check control of rental due dates in the computer system. The actual rental sheets are prepared by computer some five months in advance of the annual rental due date. These are then mailed to our field offices for review and rental recommendation by field management as to whether the Federal leases are to be retained by payment of the annual delay rental or allowed to lapse. The field is requested to return the rental sheets with their recommendations not later than 60 days prior to the rental due date. Meanwhile the delay rental checks are prepared by computer some 55 days in advance of the rental due date. The checks are audited by check writers from the Lease Rental Section against the abstract sheets to

determine accuracy, proper billing information and special mailing instructions as to forms, addresses and the like. The first week of the month prior to the delay rental due date the Lease Rental Section sends to the Treasury Department those checks which have "pay" recommendations noted on the rental sheet along with no restrictive notes. The Treasury Department then validates the checks by affixing the proper signature thereon and returns them to the Lease Rental Section. A file copy of all checks sent to the Treasury Department is retained by the Lease Rental Section to audit against the signed checks to confirm that the Treasury Department has returned all checks released to them. The Lease Rental Section then enters the check number and amount on the rental sheet to reflect that payment will be made. The checks are then mailed to the BLM or USGS on or about the 10th of the month prior to the delay rental due date. The courtesy billing notice, if available, is enclosed with the check. Normally any checks which are made after the 15th of the month are mailed by certified mail so that the Lease Rental Section will have proof of rental payment tender since checks mailed that late in the month would probably not return through bank clearing channels by the rental due date on the first of the next month.

On or about the 15th of the month, preceeding the rental due date, the Lease Rental Section secures from the computer section numerical listings of rentals due the first of the following month and these listings are compared to the numerical index record to insure that the list of all leases which should be on the rental sheets is completely accurate. This list is then compared to the rental sheets for confirmation. This audit requires the work of two people for one week and is performed to be certain that the rental sheets which were prepared five months in advance include all leases acquired since that time. On or about the 25th of the month prior to the rental due date, the Lease Rental Section prepares a final "drag" of the rental sheets to identify leases which have not been paid due to restrictive title problems, current drilling wells or other delays. The "drag" is normally performed by the assistant rental supervisor working in conjunction with a typist who prepares his report. The "drag" is then checked by a rental analyst and double checked by the Lease Rental Section Supervisor. In addition, a list is made of all rental checks which have been mailed that have not been cashed or receipted for by a return certified card or BLM or USGS receipt for payment. This list is prepared by a check writer and then audited by a rental analysis and double checked by the Lease Rental Section Supervisor. Any checks which have not cleared trigger a call by the Lease Rental Section to the BLM or USGS office to which the check was sent. This call is to determine whether the appropriate office can confirm by Federal Serial Number if payment has been received for the

Federal Lease in question. If payment has not been received immediate action is taken to remedy the situation.

During the time which I have held the position of Manager, Lease Records, which is a total of 11 years, this current situation is the only one which I can recall where Phillips failed to make timely and proper delay rental payment on a Federal lease which it desired to retain.

This lease is extremely important to Phillips because within one mile of the southeast corner of Lease No. W-062885 Phillips has expended $ 4,864,829.00 to drill the Cook "C" Well. This Well is located on the NW/SE of section 17-T. 3N R. 15E., Summit County, Utah. By virtue of a farmout agreement with Phillips this Well is currently being deepened by CIG and American Quasar. As of July 28, 1976, the depth was 21,786 feet and an additional $ 3,000,000 had been spent on the Well. The Well is not yet completed.

The foregoing facts are known by Affiant to be true of his own knowledge * * *.

/s/ Roy D. Wilber, Manager

APPENDIX II

W. F. MOORE, being duly sworn, deposes and says:

THAT he is employed by Phillips Petroleum Company, Appellant in the above entitled action, as supervisor, Lease Rental Section, Natural Resources Group, Bartlesville, Oklahoma, and makes this Affidavit in support of Appellant's Statement of Reasons in support of Appeal * * *.

I have been supervisor, Lease Rental Section, Natural Resources Group, for Phillips Petroleum Company since April 1, 1969. As such I report to Mr. Roy D. Wilber, Manager, Lease Records. My responsibilities include supervising the Lease Rental Section and overseeing all activities regarding payment of delay rentals on Federal leases held by Phillips.

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Because of a division of responsibilities within the Department of Interior, both the BLM and the USGS control Federal leases and accept delay rental payments. The lease in question originally was controlled through the BLM. Later the responsibility for the lease and the lease file were passed to the USGS and finally, in November 1975, the lease was placed back under the control of the BLM. This last switch was accomplished by letter dated November 14, 1975, attached hereto as Exhibit "A", but Phillips failed to note this address change for delay rental payments on the lease rental sheet. As a result, the address of the USGS office in Casper, Wyoming remained listed as the place of payment for the delay rentals for this lease, and the 1976 delay rental check was addressed and sent to the USGS as it had been the year before instead of to the BLM office in Casper, Wyoming.

A second error was made by an employee in my Lease Rental Section. The lease in question originally was part of a larger oil and gas lease which was divided into two segments. On the lease rental sheets the lease in question is listed by the Phillips' Lease No., P-115689. The other portion of the original lease is listed as P-115689-3. By happenstance these two leases are located at the bottom of one page of the lease rental sheet and the top of the next page. The employee, by error, stamped "ROYALTY PAID EXCEEDS THE MINIMUM" after Lease No. P-115689 instead of after Lease No. P-115689-3, where it properly belonged. This stamped notation prevented payment of the delay rental on the normal schedule of approximately 3 to 4 weeks before the delay rental due date. I discovered the mistake during my routine "drag" on May 27, 1976. I immediately asked Ms. Ava Duncan of my Lease Rental Section to have the delay rental check in the proper amount issued by the Treasury Department.

She proceeded to accomplish this and placed the check in the company mail channels sometime before 2:30 p.m. on Friday, May 28, 1976.

The company mailroom has pickup procedures designed to insure that the check would have been postmarked by the U.S. Postal Service in Bartlesville that same afternoon and thereafter arrive at its destination no later than June 1, 1976. However, on this occasion the envelope was inadvertently retained in the company mailroom until the next working day which was Tuesday, June 1, 1976, when it was delivered to the U.S. Post Office and postmarked.

At no time during this entire sequence of events was it the intention of Phillips Petroleum Company, or any of its employees, to "intentionally" delay the payment of the delay rentals for any reason whatsoever. It was always Phillips' intention and the intention of Phillips' employees to timely and properly make the delay rental payment in order to retain the Federal lease.

The foregoing facts are known by Affiant to be true of his own knowledge * * *.

/s/ W. F. Moore, Supervisor